Supreme Court, U.S.
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96 807 SEP 9 1996

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

TERRY P. PLESCHER,

Petitioner,

v.

RICHARD WILLE, in his individual and official capacities as Sheriff of the Palm Beach County Sheriff's Office; RONALD T. MATTINO, JR.; EDWARD F. HIMMELSBACH; GLEN M. GARFIELD and DAVID M. GRANT individually and in their official capacities as Deputies Sheriff of the PALM BEACH COUNTY SHERIFF'S OFFICE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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36 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Circuit's Affirmance of the District Court's Decision Vacating the Default Conflicts with the Decisions of the First Circuit, the Third Circuit, the Fourth Circuit, and the Fifth Circuit Which Hold that a Default Can Only Be Vacated Upon Good Cause, and Only if Done Within a Reasonable Time, Warranting Review by This Court.

2. Whether the Improper Admission of Collateral Source Benefits Violates this Court's Ruling in *Eichel v. New York Central Railroad*, 375 U.S. 253 (1963) and *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34 (*per curiam*), *rehearing denied*, 375 U.S. 936 (1963) Which Prohibit the Introduction of Collateral Source Benefits as Inherently Prejudicial, Warranting Review by This Court.

3. Whether the Eleventh Circuit's Decision Allowing the Admission of Collateral Source Benefits Conflicts With the Decisions of the Second, Fifth, Sixth, Eighth and Tenth Circuits Which Prohibit the Introduction of Collateral Source Evidence, Warranting Review by This Court.

4. Whether the Eleventh Circuit's *Per Curiam* Affirming the Admission of Evidence of the Plaintiff's Blood Alcohol Content Conflicts with the Decision of Every Other Circuit Considering the Issue, Warranting Review.

5. Whether the Eleventh Circuit's Decision Imposes An Impermissible Pleading Standard in cases under 42 U.S.C. §1983, and Conflicts with This Court's Decision in *Leatherman v. Tarrant County*, ___ U.S. ___, 113 S.Ct. 1160 (1993), Warranting Review.

6. Whether the Decision of the Eleventh Circuit, Affirming the Directed Verdict in Favor of Grant, is Contrary to the Decisions of the Second, Fourth, Fifth, Seventh and Eighth Circuits, Warranting Review.

TABLE OF CONTENTS

OPINION BELOW 1

JURISDICTION OF THIS COURT 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

The Procedural History of this Case, leading to the Entry of Default. 2

The Motions in Limine. 3

The Presentation of the Evidence. 4

The Defendants' Version of the Events 5

The Plaintiff's Version of the Events 6

ARGUMENT 8

I. The Eleventh Circuit's Affirmance of the District Court's Decision Vacating the Default Conflicts with the Decisions of the First Circuit, the Third Circuit, the Fourth Circuit, and the Fifth Circuit Which Hold that a Default Can Only Be Vacated Upon Good Cause, and Only if Done Within a Reasonable Time, Warranting Review by This Court. 9

II. The Improper Admission of Collateral Source Benefits Warrants Review by This Court. 11

A. The Improper Admission of Collateral Source Benefits Violates this Court's Ruling in *Eichel v. New York Central Railroad*, 375 U.S. 253 (1963) and *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34 (*per curiam*), *rehearing denied*, 375 U.S. 936 (1963) Which Prohibit the Introduction of Collateral Source Benefits as Inherently Prejudicial. 11

B. The Eleventh Circuit's Decision Allowing the Admission of Collateral Source Benefits Conflicts With the Decisions of the Second, Fifth, Sixth, Eighth and Tenth Circuits Which Prohibit the Introduction of Collateral Source Evidence. 13

III. The Eleventh Circuit's *Per Curiam* Affirming the Admission of Evidence of the Plaintiff's Blood Alcohol Content Conflicts with the Decision of Every Other Circuit Considering the Issue, Warranting Review. 15

IV. The Eleventh Circuit's Decision Affirming the Directed Verdict in Favor of the Defendant Grant is Contrary to this Court's Ruling in *Leatherman v. Tarrant County*, ___ U.S. ___, 113 S.Ct. 1160 (1993), and Contrary to the Decisions of the Second, Fourth, Fifth, Seventh and Eighth Circuits, Warranting Review. 19

A. The Eleventh Circuit's Decision Imposes An Impermissible Pleading Standard and Conflicts with This Court's Decision in *Leatherman v. Tarrant County* Warranting Review 19

B. The Decision of the Eleventh Circuit, Affirming the Directed Verdict in Favor of Grant, is Contrary to the Decisions of the Second, Fourth, Fifth, Seventh and Eighth Circuits, Warranting Review 20

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Baez v. S.S. Kresge Co., 518 F.2d 349 (5th Cir. 1975), *cert. denied*, 425 U.S. 904 (1976) 10

Ballou v. Henri Studios, Inc., 656 F.2d 1147 (5th Cir. 1981) 18

Beahlien v. United States, 497 U.S. 1038, 1039 (1990) 9

Consolidated Masonry & Fireproofing, Inc. v. Wagman Construction Corp., 383 F.2d 249 (4th Cir. 1967) 11

Davis v. Safeway Stores, Inc., 532 F.2d 489 (5th Cir. 1976) 10

Dawsey v. Olin Corp., 782 F.2d 1254 (5th Cir. 1986) 18

Doucet v. Gulf Oil Corp., 783 F.2d 518 *rehearing denied*, 788 F.2d 250 (5th Cir.), *cert. denied*, 479 U.S. 883 (1986).....14

Eichel v. New York Central Railroad, 375 U.S. 253, 255 (1963)12, 13, 15

Gagnon v. Ball, 696 F.2d 17 (2nd Cir. 1982).....22

General Contracting & Trading Co. v. Interpole, Inc., 899 F.2d 109 (1st Cir. 1990).....11

Green v. Denver & Rio Grande Western Railroad Co., 59 F.3d 1029 (10th Cir. 1995).....15

Greiner v. Volkswagenwerk Aktiengeselleschaft, 540 F.2d 85 (3rd Cir. 1976).....19

Hinds v. General Motors Corp., 988 F.2d 1039 (10th Cir. 1993)18

Hrizt v. Woma Corp., 92 F.R.D. 364 (W.D. Pa. 1981), *remanded for further consideration on other grounds*, 732 F.2d 1178 (3rd Cir. 1984).....10

Jackson v. Pantazes, 810 F.2d 426 (4th Cir. 1987).....22

Kladis v. Brezek, 823 F.2d 1014 (7th Cir. 1987) 19

Knafel v. Pepsi-Cola Bottlers of Akron, Inc., 899 F.2d 1473 (6th Cir. 1990).....14

Leatherman v. Tarrant County, ___ U.S. ___, 113 S.Ct. 1160 (1993) 20, 21

Marine National Bank v. F/V Explorer, 663 F. Supp. 462 (D. Me.), *aff'd*, 833 F.2d 375 (1st Cir. 1987).....10

McInnis v. A.M.F., Inc., 765 F.2d 240 (1st Cir. 1985).....18

McKinney v. Galvin, 701 F.2d 584 (6th Cir. 1983).....19

Miles v. Ryan, 338 F. Supp. 1065 (E.D. Pa. 1972), *aff'd*, 484 F.2d 1255 (3rd Cir. 1973).....19

Montana v. Egelhoff, ___ U.S. ___, 116 S.Ct. 2013 (1996).....16

Moses v. Union Pacific Railroad, 64 F.3d 413 (8th Cir. 1995)....15

Page v. St. Louis Southwestern Railway Co., 349 F.2d 820 (5th Cir. 1965).....14

Park Corp. v. Lexington Insurance Co., 812 F.2d 894 (4th Cir. 1987) 10

Perry v. Larson, 794 F.2d 279 (7th Cir. 1986) 14

Putman v. Gerloff, 639 F.2d 415 (8th Cir. 1981) 22

Sajian v. General Motors Corp., 916 F.2d 31 (1st Cir. 1990) 18

Saldino v. Winkler, 609 F.2d 1211 (7th Cir. 1979) 19

Santa Maria v. Metro-North Commuter Railroad, 81 F.3d 265 (2nd Cir. 1996) 15

Santiago v. Fenton, 891 F.2d 373 (1st Cir. 1989) 22

Smith v. Dooley, 591 F. Supp. 1157 (W.D. La. 1984), *aff'd*, 778 F.2d 788 (5th Cir. 1985) 22

Southern v. Plumb Tools, 696 F.2d 1321 (11th Cir. 1983) (*per curiam*) 13, 14

Stone v. City of Chicago, 738 F.2d 896 (7th Cir. 1984) 22

Thurman v. Yellow Freight Systems, Inc., 90 F.3d 1160 (6th Cir. 1996) 15

Tipton v. Socony Mobil Oil Co., 375 U.S. 34 *(per curiam)*, *rehearing denied*, 375 U.S. 936 (1963) 13, 14, 15

Webb v. Hiykel, 713 F.2d 405 (8th Cir. 1983) 22

Wilcox v. Clinchfield Railroad Co., 747 F.2d 1059 (6th Cir. 1984) 14

Yazoo County Industrial Development Corp. v. Suthoff, 454 U.S. 1157 (1982) 11

Statutes

28 U.S.C. §1254(1) 1

28 U.S.C. §1441 3

42 U.S.C. §1983 2

Rules

FED. R. CIV. PROC. 55(b)(2) 10

FED. R. CIV. PROC. 60 10
FED. R. EVID. 401 ..... 13, 18
FED. R. EVID. 403 ..... 13, 18

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Eleventh Circuit entered in this cause on June 10, 1996.

OPINION BELOW

The *per curiam* opinion of the United States Court of Appeals for the Eleventh Circuit is not reported. This opinion is printed in the appendix (A-1 through A-2) to this petition. The United States District Court for the Southern District of Florida issued did not issue a written opinion in this case. A copy of the order of the district court, denying the Plaintiff's motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, is printed in the Appendix (A-3 through A-4) to this petition. The order by the district court, entering final judgment, is printed in the Appendix (A-5 through A-6) to this petition.

JURISDICTION OF THIS COURT

The Eleventh Circuit Court of Appeals issued its opinion in this matter on June 10, 1996. No petition for a rehearing was filed in this matter. This petition was filed within 90 days after the entry of the Eleventh Circuit's decision in this matter. This court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. AMEND. IV provides

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and

particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This case concerns four important issues: the uniform application of the Federal Rules of Civil Procedure, the abrogation of the collateral source rule, the introduction of prejudicial evidence of intoxication and the standard for pleadings and directed verdicts.

The Procedural History of this Case, leading to the Entry of Default.

This case started out in state court for Palm Beach County, Florida. The Plaintiffs Terry Plescher, and his wife, Jill Plescher, sought relief against a number of Defendants, all sheriff's deputies for Palm Beach County, for violations of Terry Plescher's constitutional rights, and for state-law claims of assault, battery and negligence.

The Defendants removed the action to the United States District Court for the Southern District of Florida. (R.1). The Plaintiff originally brought this action in the Circuit Court of Palm Beach County, Florida, seeking recovery under 42 U.S.C. §1983 and state law claims. The Defendants then removed this case from state court to federal court, the United States District Court for the Southern District of Florida, pursuant to the Federal Removal Statute, 28 U.S.C. §1441. (R.1.). Removal jurisdiction was based upon 28

U.S.C. §1441(b), as the original complaint alleged violations of 42 U.S.C. §1983.

On September 16, 1994, the district court granted the Plaintiffs leave to file an amended complaint. (R.90). Terry Plescher filed an amended complaint on October 20, 1994. (R.93). The clerk's docket entry for the filing of the amended complaint indicated that the Defendants' answer to the amended complaint was due on October 31, 1994. (R.93).

Although the docket entry required the Defendants to file an answer to the amended complaint by October 31, 1995, no answer was filed by the Defendants within that time period. Accordingly, on November 18, 1994, the Plaintiff moved for a default against all Defendants. (R.98). The Defendants responded to that motion on November 21, 1994, (R.100), and tendered an answer on November 21, 1994. (R.99). The Defendants did not seek leave of court to file that answer, which was untimely. The clerk then entered a default against all Defendants. (R.102).

On February 27, 1995, the district court set the matter for trial at a special trial setting. (R.121). Trial was set for March 6, 1995. (R.121). On March 2, 1995, the Plaintiff moved the district court to limit the presentation of evidence to the issues of damages, based upon the earlier-entered default. (R.122). The Defendants did not respond to that motion. On the first day of trial, the district court asked the Defendants about this default. (Tr.2). The Defendants admitted to the district court that they did not take any action to vacate the default. (Tr.4). The Defendants attempted to excuse their conduct on the grounds that they did not believe that the clerk's entry of November 21, 1994, was a default, (Tr.4). The district court rejected the Defendants' characterization of the November 21, 1994 order, and ruled that it was a default. (Tr.4). Without hearing any response from the Defendants other than their statement that they had not taken any action, the district court vacated the default. (Tr.5).

The Motions in Limine.

Prior to trial, the Plaintiff filed a number of motions in limine. Two are relevant to this appeal. The first motion asked the district court to bar any evidence of the Plaintiff's blood-alcohol content.

(R.138). The district court denied that motion. (Tr.17). The second motion asked the district court to bar the introduction of evidence of benefits received by the Plaintiff from any collateral source. (R.118). In that motion, the Plaintiff stated that this evidence would be inadmissible at trial. (R.118). When the Plaintiff presented that motion, the Defendants argued that the fact that the Plaintiff's disability was caused by a prior injury was relevant to damages. (Tr.20). The Plaintiff agreed that while the fact of the previous injury may come in, any benefits received from the workers' compensation settlement should be excluded under the collateral source rule. (Tr.20). When the Plaintiff said that only the money should be excluded, the Defendants said "[t]hat's fine." (Tr. 21).

The agreement by the Defendants not to introduce the workers' compensation benefits did not last long.

The Presentation of the Evidence.

This case tested the credibility of the Plaintiff against the credibility of the Defendants. The Plaintiff claimed that the Defendants intentionally broke his leg. The Defendants denied it.

Surprisingly, most of the facts leading up to the Plaintiff's broken leg were not in dispute. Four Palm Beach County Sheriff's deputies responded to a radio call concerning a battery and shooting in the Drexel-Okeechobee area of West Palm Beach County in the late evening of July 29, 1990. (Tr.120-121). At the scene, the Plaintiff was arrested and handcuffed. (Tr. 139-140).

After the Plaintiff was handcuffed, he began to complain of back pain. (Tr.143). The Defendants decided to take the Plaintiff to a hospital to obtain a medical clearance. (Tr.124).

Because the Plaintiff was complaining of back injuries, Grant, Garfield and Mattino decided to call for a van to transport the Plaintiff to the hospital. Defendant Edward Himmelsbach was driving the van that night. (Tr.126). Himmelsbach drove the Plaintiff to Humana Hospital, the designated medical care facility for prisoners under a contract with the Palm Beach County Sheriff's office. (Tr.155). Mattino followed Himmelsbach to Humana Hospital. (Tr.156-157).

When Mattino and Himmelsbach arrived at Humana Hospital, they took the Plaintiff out of the van, assisted by Evilio Santiago, an emergency room technician. (Tr.456). During the time that the Plaintiff was first at Humana Hospital, he tried to escape. (Tr.458). He was captured and placed back in the rear of Himmelsbach's transport van. (Tr.162).

Himmelsbach left Humana Hospital with the Plaintiff in the back of his van at 1:53 a.m. (Tr.165, 213). The Plaintiff was not fighting in the van, nor did he have any physical injuries when he was placed in the van at Humana Hospital. (Tr. 165). According to Dr. Llemalas, the emergency room physician, the plaintiff "was handcuffed behind his back and had leg restraints on..." when he left the hospital. (Tr.527).

The Defendants' Version of the Events

After Himmelsbach left with the Plaintiff, Mattino went back into the hospital to complete the paperwork necessary to book the Plaintiff into the jail. (Tr.166). A few minutes later Mattino received a radio call from Himmelsbach, stating that the Plaintiff was kicking the back door of the van. (Tr.166). Mattino left the emergency room, and got into his car. (Tr.167). Somewhere between the 45th Street exit and the Palm Beach Lakes exit on southbound I-95, Mattino caught up with Himmelsbach. (Tr.169). When Mattino arrived where Himmelsbach had stopped, the Plaintiff was inside the van, with the van doors closed. (Tr.170).

Mattino and Himmelsbach then opened the van doors in order to put leg restraints on the Plaintiff. (Tr.172). The Plaintiff was not kicking the van doors when Mattino and Himmelsbach walked up to the van. (Tr.172). Mattino said that he and Himmelsbach intended to put the leg restraints on the Plaintiff in a "three point restraint system" called "hog tying." (Tr.174-175).

When the Plaintiff refused to come out of the van Mattino and Himmelsbach grabbed the Plaintiff's legs and dragged the Plaintiff out of the van. (Tr.179). While the Plaintiff was on the ground, Mattino placed the leg restraints on the Plaintiff, (Tr.179), in the three-point restraint system. (Tr.181, 262). Mattino said that the Plaintiff did not have a broken leg at the time he placed the leg restraints on the Plaintiff. (Tr.180). Himmelsbach also said that the

Plaintiff did not have any injuries after the Plaintiff had been "hog tied" and placed back in the van. (Tr. 263). Mattino did see a cut on the Plaintiff's face which was bleeding. (Tr.181-182).

Grant then came to the scene, (Tr.184, 267). After Grant arrived, he, Mattino and Himmelsbach all left the scene to go back to Humana Hospital. (Tr.187).

The Plaintiff's Version of the Events

The Plaintiff's testimony was consistent with the Defendants' testimony until the point where he left Humana Hospital at 1:53 a.m. on July 30, 1990, with one important exception. The Plaintiff testified, consistent with Mr. Santiago and Dr. Llemalas, that he was in leg irons when he left the hospital at 1:53 a.m. (Tr.682-683).

Upon leaving Humana hospital after the first incident, the Plaintiff testified that he was placed in the same van in which he was brought to the hospital. (Tr.684). The van made several turns, then ran over some bumps and made a u-turn and stopped. (Tr.685). The Plaintiff at this point was scared, because he knew that he was not at the jail. (Tr.685). The Plaintiff said that the drive from the hospital to the place where they stopped was only a couple of minutes. (Tr.689). Two deputies opened the doors of the van and dragged the Plaintiff out of the van. (Tr.685). The deputies were Himmelsbach and Mattino. (Tr.686). They grabbed the Plaintiff and carried him over to an area where there were parking bumpers, some trees, a chain link fence and a brick building. (Tr.686-687).[1]

The Plaintiff was placed face down on the ground. Either Himmelsbach or Mattino, the Plaintiff was not sure which one, had his knee in the Plaintiff's back as the Plaintiff was lying face down.

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[1]The Plaintiff's story was circumstantially corroborated by one of the Defendants. Himmelsbach admitted that he had previously worked as the director of security for the Days Inn, located next to the 45th Street Exit of I-95. (Tr.278). Himmelsbach said that he was familiar with the structure of the Days Inn. (Tr.279). Thus, if Plaintiff's story were true, Himmelsbach would have been familiar with the parking lot of the Days Inn. This parking lot matched the description of the area where the Plaintiff said his leg was broken. (Tr.854-855).

(Tr.687-688). The other Defendant grabbed the Plaintiff's leg, put it over a parking bumper and jumped on it. (Tr.688). Himmelsbach and Mattino then stood up and started laughing. (Tr.688).

Immediately after his leg was broken, Grant drove up. (Tr.688). Grant got out of his car and said "What the hell is going on?" (Tr.688-689). One of the other Defendants, either Himmelsbach or Mattino, said "[h]e ain't going to run again." (Tr.690). The three Defendants then picked up the Plaintiff and threw him back into the van. (Tr.688).

The Return to the Hospital

Mattino, Himmelsbach and Grant arrived back at Humana Hospital with the Plaintiff seven minutes after they left. (Tr.466, 536)). According to Mr. Santiago, the emergency room technician, the hospital received a telephone call saying that the van was on its way back. (Tr.466). Dr. Llemalas said that there was a call on the radio, and that the caller did not specify why they were bringing the Plaintiff back to the hospital. (Tr.533). Dr. Llemalas testified that the when the Plaintiff returned to the emergency room at 2:00 a.m., "[h]e was restrained in the exact same fashion as he was restrained when he left the emergency department." (Tr.538). Dr. Llemalas specifically testified that the Plaintiff was in leg irons when he returned, the same condition as when he left. (Tr.547).

When Himmelsbach, Mattino and Grant arrived back at the hospital, they were again met by Mr. Santiago. (Tr.468-469). Mr. Santiago testified that the van had two rear doors that opened with a chrome handle in the middle. (Tr.470). When the Defendants returned with the Plaintiff, the Plaintiff had a broken leg. (Tr.189). Mr. Santiago said that the break was an obvious injury. (Tr.502). Dr. Llemalas said that the Plaintiff told him that "they broke my leg." (Tr.541).

After Himmelsbach returned to the hospital, he said that he noticed damage to the van door. (Tr.271). Mattino said that he never saw the Plaintiff kick the back door of the van, nor did anyone ever tell him that the Plaintiff had continued to kick the back door of the van, after the Plaintiff was put into leg restraints.

(Tr.189). Himmelsbach however, testified that the Plaintiff continued to kick the back of the door after being "hog tied." (Tr.270). Himmelsbach took a photograph of the door, and the photograph showed that all of the damage was sustained above the upper hinge on the door. (Tr.271). Grant told Himmelsbach to prepare a damage report for the van. (Tr.276). Grant also filled out information on the damage report. The damage report was filled out by Grant at 1:35 a.m. on July 29, 1990. (Tr.615).

ARGUMENT

This case presents the important questions of whether the Federal Rules of Civil Procedure mean what they say they mean, whether the long-standing collateral source rule should be abandoned in civil rights actions, whether the evidence of intoxication should now be admitted to test the credibility of a witness, and whether directed verdicts should be based on improper pleading requirements. These questions are part of the fabric of many civil rights cases in this country. A shift of such proportions should not be based upon the eleventh circuit's *per curiam* decision in this case.

Under Supreme Court Rule 10, this Court has listed four general areas that would warrant granting a writ of certiorari; if the decision under review conflicts with the decision of another court of appeals, if the decision of a state court conflicts with the decision of another state court on a federal issue, if a court of appeals has decided an important issue not yet decided by this court, or in a way that conflicts with applicable decisions of this Court. However, these reasons are not exhaustive. *C.f.*, *Beahlien v. United States*, 497 U.S. 1038, 1039 (1990) (White, J., dissenting from denial of certiorari) (Justice White notes that the court has accepted review in important cases, not fitting into any of the three listed categories).

Here, the *per curiam* decision of the eleventh circuit directly conflicts with prior decisions of this court, and with the decisions of other circuit courts. Thus, the decision should be reviewed. Further, this case raises the specter that jury verdicts can be based wholly upon a plaintiff's character, instead of a rational view of the evidence. While it is up to a jury to decide questions of fact, in this

case, the district court's admission of prejudicial evidence suggests that a substantial injustice occurred. This case should be reviewed.

I. The Eleventh Circuit's Affirmance of the District Court's Decision Vacating the Default Conflicts with the Decisions of the First Circuit, the Third Circuit, the Fourth Circuit, and the Fifth Circuit Which Hold that a Default Can Only Be Vacated Upon Good Cause, and Only if Done Within a Reasonable Time, Warranting Review by This Court.

When trial commenced on March 6, 1995, the Defendants were in default, and had been in default since November 21, 1994. During the intervening three and one-half months, the Defendants took no action to vacate the default. On the morning of trial, the trial court vacated that default, without applying any of the requirements of the Federal Rules of Civil Procedure.

The eleventh circuit affirmed the district court's decision. This decision conflicts with the decisions of the first circuit, *Marine National Bank v. F/V Explorer*, 663 F. Supp. 462 (D. Me.), *aff'd*, 833 F.2d 375 (1st Cir. 1987), the third circuit, *Hrizt v. Woma Corp.*, 92 F.R.D. 364 (W.D. Pa. 1981), *remanded for further consideration on other grounds*, 732 F.2d 1178 (3rd Cir. 1984), the fourth circuit, *Park Corp. v. Lexington Insurance Co.*, 812 F.2d 894 (4th Cir. 1987), and the fifth circuit, *Davis v. Safeway Stores, Inc.*, 532 F.2d 489 (5th Cir. 1976) and *Baez v. S.S. Kresge Co.*, 518 F.2d 349 (5th Cir. 1975), *cert. denied*, 425 U.S. 904 (1976).

In each of these cases, the courts applied the tests under FED. R. CIV. PROC. 55(b)(2), or FED. R. CIV. PROC. 60, that is, that the party seeking to set aside the default, in addition to showing "good cause" or "excusable neglect" must also show that it acted promptly, had a meritorious defense and that setting aside the default would not unduly prejudice the non-moving party. In each case the court concluded that these requirements had not been met, and it was an abuse of discretion to vacate the default. *Hrizt*, 92 F.R.D. at 366-367.[2]; *Davis*, 532 F.2d at 490; *Baez*, 518 F.2d at

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[2]On appeal, the court of appeals agreed with the district court's ruling that the plaintiff had not been prejudiced and that the defendants had a meritorious

350; *Park Corp.*, 812 F.2d at 897. In each of these cases, the court found that the defendants had failed to show "good cause" to vacate the default. Here, of course, there is an absence of *any* cause, good or bad.

.The second part of the test requires that the Defendants take prompt action to vacate the default. Once again, the *per curiam* decision in this case conflicts with the decisions from other circuits. A review of the case law demonstrates that a delay as short as six weeks is not "prompt action." *Marine National Bank*, 663 F. Supp. 462, 466 (D. Me.), *aff'd*, 833 F.2d 375 (1st Cir. 1987) (six-week delay in filing motion to vacate default judgment excessive). Other courts have similarly ruled that relatively short delays in filing a motion to vacate did not constitute "prompt action." *See, e.g., General Contracting & Trading Co. v. Interpole, Inc.*, 899 F.2d 109, 112 (1st Cir. 1990) (three and one-half month delay); *Consolidated Masonry & Fireproofing, Inc. v. Wagman Construction Corp.*, 383 F.2d 249, 251 (4th Cir. 1967) (two and one half month delay).

The delay in this case was over three months, an excessive delay, especially as the Defendants had notice of the motion for default, had notice of the default, had notice of the Plaintiff's intention to proceed on damages only, and, despite all that notice, took no actions to vacate the default. By affirming the district court, the eleventh circuit is in direct conflict with the decisions from these other circuits.

The proper application of the Federal Rules of Civil Procedure is not some mere academic exercise. Instead, it addresses the fundamental process that should be followed by courts in this country. This Court has cautioned that strict adherence to the Federal Rules of Civil Procedure is necessary to ensure the prompt administration of justice. Dissenting from the denial of certiorari, Chief Justice Rehnquist has warned "[w]ith the vast expansion in the case dockets of all federal courts in recent years, the more settled the procedural system by which these cases are to run the

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defense. However, the court of appeals remanded the matter back to the district court for an express finding that the defendant's failure to answer was the result of inexcusable neglect, rather than mere negligence.

judicial gauntlet, the better off will be litigants, lawyers, and judges." *Yazoo County Industrial Development Corp. v. Suthoff*, 454 U.S. 1157, 1161-1162 (1982) (Rehnquist, J., Dissenting).

This court should accept the petition for certiorari to review the issue of the default.

II. The Improper Admission of Collateral Source Benefits Warrants Review by This Court.

Prior to trial the Defendants represented to the court that they would not seek to introduce evidence of disability benefits received by the Plaintiff. Notwithstanding that representation, the Defendants then introduced, over objection, the fact that the Plaintiff was receiving disability benefits under workers' compensation. This court has previously ruled that such evidence is so inherently prejudicial, admission of the evidence warrants a new trial. Further, every circuit that has considered the issue has prohibited the admission of such evidence. Thus, the decision of the eleventh circuit conflicts with the decisions of the other circuits, warranting review.

A. The Improper Admission of Collateral Source Benefits Violates this Court's Ruling in *Eichel v. New York Central Railroad*, 375 U.S. 253 (1963) and *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34 (*per curiam*), *rehearing denied*, 375 U.S. 936 (1963) Which Prohibit the Introduction of Collateral Source Benefits as Inherently Prejudicial.

The Defendants, over objection, and in violation of their agreement prior to trial, introduced evidence of disability benefits received by the Plaintiff. This Court has previously held that it is well-settled federal law that admission of benefits a plaintiff receives from collateral sources is inadmissible, as the evidence "is readily subject to misuse by a jury." *Eichel v. New York Central Railroad*, 375 U.S. 253, 255 (1963). In *Eichel*, 375 U.S. at 255-56 this Court excluded evidence of Railroad Retirement Act benefits, even though the defendant offered them to show plaintiff's motive for staying out of work. 375 U.S. at 255-56. Thus, *Eichel* stands for the proposition that collateral source benefits should be

excluded, regardless of the "theory" under which they are offered into evidence.

The Defendants had agreed, prior to jury selection, that they would not seek to introduce evidence of workers' compensation benefits received by the Plaintiff. (Tr.20-21). Despite this agreement, the Defendants then sought to introduce evidence of the benefits received by the Plaintiff from the workers' compensation injury. Over objection, the district court allowed the testimony. (Tr. 413-414).

After the district court's ruling, the Defendants asked every possible witness whether they knew the amount of the Plaintiff's worker's compensation benefits, including the Plaintiff's expert economist, (Tr. 415-417); a physiatrist, (Tr. 732), the Plaintiff's vocational rehabilitationist, (Tr. 433); .the Defendants' vocational rehabilitationist, (Tr. 783-786, 789), and the Plaintiff (Tr. 843)

The Defendants' closing argument stressed the receipt of these collateral benefits, mentioning the $1,440 monthly worker's compensation benefits. (Tr.890, 892). The Defendants told the jury that "you also heard Sharon Griffen tell you that Mr. Plescher is receiving lifetime workmen's compensation benefits . . ." (Tr.891). The Defendants told the jury that all of the Plaintiff's surgeries had been paid by worker's compensation. (Tr.897).

All of this evidence was irrelevant under FED. R. EVID. 401, and inherently prejudicial under FED. R. EVID. 403. In this case, the district court improperly permitted the Defendants to introduce evidence of disability benefits received by the Plaintiff. This testimony, by its very nature, violated the collateral source rule. Further, this was not harmless error. This Court has held that introducing evidence of collateral benefits is reversible error, even if the jury returns a "no liability" verdict, because of the potential for misuse of evidence of collateral benefits. *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 36, *(per curiam)*, *rehearing denied*, 375 U.S. 936 (1963) (evidence of benefits under Longshore and Harbor Workers' Compensation Act too prejudicial and thus excluded). Because the eleventh circuit's decision allowing the admission of collateral source evidence conflicts with this Court's decisions in *Eichel* and *Tipton*, this Court should review that decision.

B. The Eleventh Circuit's Decision Allowing the Admission of Collateral Source Benefits Conflicts With the Decisions of the Second, Fifth, Sixth, Eighth and Tenth Circuits Which Prohibit the Introduction of Collateral Source Evidence.

Following this Court's decisions in *Eichel* and *Tipton*, courts have "vigorously [applied] the collateral source rule to prohibit evidence regarding workmen's compensation benefits." *Southern v. Plumb Tools*, 696 F.2d 1321, 1323 (11th Cir. 1983) (*per curiam*). The federal collateral source rule applies to §1983 actions. *Perry v. Larson*, 794 F.2d 279, 285 (7th Cir. 1986). Under this rule, workers' compensation benefits are subject to the collateral source rule. *Knafel v. Pepsi-Cola Bottlers of Akron, Inc.*, 899 F.2d 1473, 1480 (6th Cir. 1990). Further, the evidence is prejudicial even if the defendant proffers a reason for its admission, other than for damages. Even an argument by counsel that the plaintiff in a tort suit will receive workers' compensation is improper and prejudicial because it may adversely affect the jury's deliberations or violate the collateral source rule. *Doucet v. Gulf Oil Corp.*, 783 F.2d 518, 523, *rehearing denied*, 788 F.2d 250 (5th Cir.), *cert. denied*, 479 U.S. 883 (1986).

Thus, as a matter of federal common law, the collateral source rule bars any evidence of benefits the Plaintiff may have received in this case from outside sources.

Following *Tipton*, courts have held that the prejudice caused by the improper introduction of workers' compensation benefits "would not be limited to the issue of damages and could infect the determination of liability." *Southern*, 696 F.2d at 1323. There, the eleventh circuit held it was reversible error to permit introduction of workers' compensation benefits, even though the jury returned a defense verdict. 696 F.2d at 1324.

Courts from every other circuit that has considered the issue have similarly ruled that the introduction of worker's compensation benefits is reversible error, even if the jury returns a verdict of no liability. *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820, 821-22 (5th Cir. 1965). As the *Page* court stated, "[w]ith the whole result in our case being the enigma wrapped in the mystery of a general verdict concealing forevermore the use or uses to which

the jury might have put this evidence, we cannot say that the error, preserved by emphatic and timely objection, was harmless." 349 F.2d at 821.

Similarly, in *Wilcox v. Clinchfield Railroad Co.*, 747 F.2d 1059 (6th Cir. 1984), the court followed this court's decisions in *Tipton* and *Eichel*, and ruled that those cases indicated "the strength of the legal rulings which prohibit a defendant from showing collateral benefits which an injured party may have received which might influence a jury adversely determining the issue of liability." 747 at 1061. The *Wilcox* court held that it was reversible error to admit evidence of worker's compensation benefits, even though the jury returned a defense verdict. 747 F.2d at 1061-62.If the Plaintiff is not entitled to a judgment in his favor, he is certainly entitled to a new trial.

The decision in this case also conflicts with the sixth circuit's recent decision in *Thurman v. Yellow Freight Systems, Inc.*, 90 F.3d 1160, 1170-71 (6th Cir. 1996). There, the sixth circuit held that worker's compensation benefits are a collateral source, and should not be deducted from backpay in a Title VII case. Similarly, in *Santa Maria v. Metro-North Commuter Railroad*, 81 F.3d 265, 272 (2nd Cir. 1996) the second circuit followed this Court's decision in *Eichel* to exclude evidence of payments made from collateral sources in a FELA case.

In *Moses v. Union Pacific Railroad*, 64 F.3d 413, 416 (8th Cir. 1995), the eighth circuit followed *Tipton*, and held that evidence of collateral benefits should be excluded "because of the danger that the jury may be inclined to find no liability, or to reduce a damage award, when it learns that plaintiff's loss is entirely or partially covered." *See also, Green v. Denver & Rio Grande Western Railroad Co.*, 59 F.3d 1029, 1032-1034 (10th Cir. 1995) (collateral source rule bars evidence of disability payments in FELA case, introduction of that evidence warrants reversal).

III. The Eleventh Circuit's *Per Curiam* Affirming the Admission of Evidence of the Plaintiff's Blood Alcohol Content Conflicts with the Decision of Every Other Circuit Considering the Issue, Warranting Review.

Regrettably, the workers' compensation evidence was not the only prejudicial evidence introduced into the trial. The Defendants also introduced, without foundation, evidence of the Plaintiff's intoxication. This evidence was inadmissible under the decision of every other circuit that has considered the issue. The conflict between the eleventh circuit's decision in this case, and the other circuits, warrants review by this Court. Further, in a different context, this Court recently viewed evidence of intoxication with a jaundiced eye in *Montana v. Egelhoff*, ___ U.S. ___, 116 S.Ct. 2013 (1996). In *Egelhoff*, this court rejected a claim by a defendant that he should have been permitted to introduce evidence of intoxication. While this case presents the issue of intoxication in a different context, some of the issue present in *Egelhoff*, including diversion from the main facts, are present here.

At several points during the trial, the Defendants implied that the Plaintiff was a chronic alcoholic. The Plaintiff had moved, *in limine*, for an order prohibiting such evidence. This motion was denied. However, the court erred in allowing such evidence in this case.

The Defendants started the intoxication theme early in the case, beginning in opening argument. In opening statement, the Defendants told the jury that one of the witnesses, Dr. Llemalas, would testify that the Plaintiff "reeked of alcohol." (Tr.90). The Defendants then immediately followed up that statement by telling the jury that the Plaintiff's blood alcohol level was "in the neighborhood of .3, almost 4 times the legal limit." (Tr.90). The Defendants continued the theme by telling the jury in opening statement that the hospital staff, including "nurse Kruer, who drew the blood alcohol level" would tell the jury how the Plaintiff acted at the hospital. (Tr.92). The Defendant returned to the intoxication theme again by stating that after the Plaintiff returned to the hospital for a second time, he had a blood alcohol taken "which shows a .30 blood alcohol level which as I indicated earlier is

almost four time the legal limit." (Tr.101). The Defendants then told the jury that they would call a toxicologist, Tom Carroll,

> who will come in and tell you that someone with that blood alcohol level, that high a blood alcohol level is indicative of somebody who has a chronic alcoholic problem and his tolerance builds up over the years due to alcoholism, you need more and more alcohol to get intoxicated.
>
> Mr. Carroll will also talk about the anesthesia effect that amount of alcohol has on an individual. Mr. Carroll will also talk about the fact that because he was a chronic alcoholic, a .3 blood alcohol level would result in death or coma for most people, but for a chronic alcoholic, they are able to function.

(Tr.102). Neither Nurse Kruer, nor Mr. Carroll ever testified at trial.

The Defendants continued the theme during Himmelsbach's testimony. Counsel asked Himmelsbach whether the Plaintiff had been drinking alcoholic beverages, to which Himmelsbach said that the Plaintiff "wasn't acting the way I would figure a sober person would be." (Tr.287). Then counsel asked Himmelsbach if the Plaintiff was acting like a drunk which elicited the reply "[s]omewhat, yes." (Tr.287). The Defendants asked every occurrence witness whether the Plaintiff was intoxicated. They asked Mr. Santiago, the emergency room technician at Humana Hospital whether the Plaintiff was under the influence of alcohol, to which Mr. Santiago answered "I smelled alcohol on him." (Tr.491). The Defendants then introduced the Plaintiff's medical chart through the testimony of Dr. Llemalas. The Defendants elicited from Dr. Llemalas that the Plaintiff's blood alcohol level was 319.65. (Tr.559). The Defendants specifically asked Dr. Llemalas "[s]o by today's standards he was four times the limit for the state of intoxication in the State of Florida." Dr. Llemalas answered "yes." (Tr. 559).

The Defendants also introduced evidence of intoxication through Dr. Lichtblau, the physiatrist. The Defendants asked if Dr. Lichtblau was able to render an opinion on the effects of a .31 blood alcohol level. (Tr.762). Dr. Lichtblau said the Plaintiff's blood alcohol level was "four times the legal limit." (Tr.763).

The Defendants concluded their case by calling the Plaintiff. Once again, they made intoxication a major theme. They asked how much the Plaintiff had to drink the evening of his arrest. (Tr.815). They asked how many beers the Plaintiff drank earlier in the day, dwelling, at length on this issue. (Tr.816-821). The Defendants then asked the Plaintiff if he "had an awful lot of beers to drink." (Tr.847).

The Defendants made intoxication a key theme in their closing arguments, referring to the Plaintiff as "not the first belligerent antagonistic drunk" that Himmelsbach had ever run "into in his career." (Tr.885).

In this case, all of this evidence should have been excluded as irrelevant under FED. R. EVID. 401, and prejudicial under FED. R. EVID. 403. Evidence of intoxication is extremely prejudicial, especially when it is not directly relevant to any issue in the lawsuit. Every other circuit which has considered the issue has excluded evidence of intoxication under FED. R. EVID. 403, where intoxication did not directly relate to an issue in the case. *See, Hinds v. General Motors Corp.*, 988 F.2d 1039, 1048-49 (10th Cir. 1993) (trial court properly excluded evidence of plaintiff's intoxication in defective seat-belt case, intoxication did not relate directly to any issue in case, and prejudicial impact substantially outweighed probative value); *Dawsey v. Olin Corp.*, 782 F.2d 1254, 1265 (5th Cir. 1986) (evidence of intoxication prejudicial, however, prejudice cured where trial court sustained the objection and immediately issued instruction to jury). This conflict alone warrants review by this court.

Those cases which have permitted evidence of intoxication have recognized its prejudicial impact, but have permitted its introduction, especially if it related to the operation of a motor vehicle that was the genesis of the action. *See, Sajian v. General Motors Corp.*, 916 F.2d 31, 34 (1st Cir. 1990) (relevance of

intoxication of motorist involved in single car accident outweighed its prejudicial impact, where driver error only other explanation for accident); *McInnis v. A.M.F., Inc.*, 765 F.2d 240, 246 (1st Cir. 1985) (although evidence of intoxication prejudicial, it was not excluded where it went directly toward plaintiff's contributory negligence in operating motorcycle); *Ballou v. Henri Studios, Inc.*, 656 F.2d 1147, 1154 (5th Cir. 1981); *Greiner v. Volkswagenwerk Aktiengeselleschaft*, 540 F.2d 85, 88-89 (3rd Cir. 1976). Courts have also allowed evidence of intoxication in cases where the issue was whether the police had probable cause to arrest a civil-rights plaintiff. *Kladis v. Brezek*, 823 F.2d 1014, 1018-19 (7th Cir. 1987); *McKinney v. Galvin*, 701 F.2d 584, 586-87 (6th Cir. 1983). Evidence of intoxication has also been permitted in civil rights cases where the issue was whether an officer's use of force was justified under the circumstances. *Saldino v. Winkler*, 609 F.2d 1211, 1214 (7th Cir. 1979) (issue of plaintiff's intoxication relevant to whether officer justified in using deadly force against plaintiff).

This case presents none of the exceptions to the rule that intoxication evidence should be excluded as prejudicial. This case is not a motor vehicle accident case. This case did not concern the Defendants' "probable cause" to arrest the Plaintiff. The Defendants did not argue that their use of force was reasonable, if the Plaintiff's story that they broke his leg was true. Thus, the evidence of intoxication did not relate directly to any issue in this case. Instead, its only purpose was to unfairly prejudice the jury.

Further, the error in this case was compounded by the Defendants' attempts to argue that the Plaintiff was so intoxicated that his testimony could not be credited. In *Miles v. Ryan*, 338 F. Supp. 1065 (E.D. Pa. 1972), *aff'd*, 484 F.2d 1255 (3rd Cir. 1973), the court rejected a similar attempt to introduce evidence of intoxication. There, as in this case, the proponent of the intoxication evidence argued that consumption of intoxicating beverages was admissible to show that the witness' observation and memory was impaired. The court ruled that evidence of intoxication is usually considered so prejudicial, it should not be admitted. 338 F. Supp. at 1067. There, the court ruled that the evidence was properly excluded, despite the claim that it was relevant to "impaired memory." Here, the Defendants argued

during trial, and at closing argument that the Plaintiff was so drunk that his testimony could not be believed.

In this case, the evidence of intoxication should have been excluded as unfairly prejudicial. The eleventh circuit's decision, allowing the admission of such evidence in conflict with every other court that has considered the issue, should be reviewed.

IV. The Eleventh Circuit's Decision Affirming the Directed Verdict in Favor of the Defendant Grant is Contrary to this Court's Ruling in *Leatherman v. Tarrant County*, ___ U.S. ___, 113 S.Ct. 1160 (1993), and Contrary to the Decisions of the Second, Fourth, Fifth, Seventh and Eighth Circuits, Warranting Review.

The eleventh circuit affirmed the district court's decision directing a verdict for Defendant Grant at the close of the Plaintiff's case. The district court's reasoning was that the amended complaint did not contain an allegation that Defendant Grant covered-up the excessive force of Defendants Himmelsbach and Mattino. (Tr.702). However, the district court was wrong. Under this court's decision in *Leatherman v. Tarrant County*, ___ U.S. ___, 113 S.Ct. 1160 (1993), the Amended Complaint sufficiently alleged a cover-up by Grant. Further, the facts adduced at trial, when viewed in the light most favorable to the Plaintiff, could have sustained a jury verdict against Grant. Thus, the decision of the eleventh circuit in this case conflicts with the decisions of the second, fourth, fifth, seventh and eighth circuits, warranting review.

A. The Eleventh Circuit's Decision Imposes An Impermissible Pleading Standard and Conflicts with This Court's Decision in *Leatherman v. Tarrant County* Warranting Review

The Amended Complaint alleges that Defendant Grant arrived contemporaneously with Defendants Himmelsbach and Mattino breaking the Plaintiff's leg over the parking bumper. (R.93, ¶¶27, 28). The Amended Complaint alleges that the Defendant Grant was acting under color of state law. (R.93, ¶56). Further, the Amended Complaint specifically alleges that Grant "sanctioned, ratified, authorized or otherwise covered up" the actions of his subordinates" and "assisted the co-defendants in covering up the

cause of plaintiff's injuries, undertaking no investigation in determining the cause of plaintiff's injuries and/or alternatively supporting co-defendants' allegation that plaintiff's injuries were self-inflicted." (R.93, ¶62). Thus, the Amended Complaint specifically alleges that Defendant Grant assisted Defendants Himmelsbach and Mattino in covering-up the true cause of the Plaintiff's injuries.

The district court's decision that these allegations did not allege a cover-up was contrary to this Court's decision in *Leatherman v. Tarrant County*. Under this Court's holding in *Leatherman*, there is no "heightened" pleading requirements for §1983 claims. 113 S.Ct. at 1162. Thus, a complaint is valid under §1983 as long as it alleges two elements; first, that the plaintiff has been deprived of a federal right, and second that the person or persons who deprived him of that right acted under color of state law. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). The amended complaint met both of these tests as to Defendant Grant.

The conflict between the district court's ruling, affirmed by the eleventh circuit, and this Court's holding in *Leatherman*, warrants review.

B. The Decision of the Eleventh Circuit, Affirming the Directed Verdict in Favor of Grant, is Contrary to the Decisions of the Second, Fourth, Fifth, Seventh and Eighth Circuits, Warranting Review.

Further, the eleventh circuit's decision affirming the district court is in conflict with the decisions of the second, fourth, fifth, seventh and eighth circuits, who have all held that it is improper to direct a verdict in favor of a defendant in similar circumstances.

In this case there were sufficient facts for the jury to find liability against Grant. The Plaintiff's testimony was that Grant pulled up immediately after Mattino and Himmelsbach broke the Plaintiff's leg. (Tr.688). The Plaintiff was still lying on the ground when Grant pulled up. (Tr.688). The Plaintiff specifically identified Grant as the officer who pulled up as he was lying on the ground. (Tr.689). Thus, the Plaintiff's testimony puts Grant at the

scene immediately after Himmelsbach and Mattino broke the Plaintiff's leg.

At this point, it was a jury question whether Grant was on the scene in time to prevent Himmelsbach's and Mattino's use of excessive force against the Plaintiff. Every other circuit has held that these facts present a jury question. *See, Jackson v. Pantazes*, 810 F.2d 426, 430 (4th Cir. 1987) (question of fact whether police officer could have prevented excessive force by bail bondsman, thus, district court erred in granting defendants' motions for summary judgment); *Gagnon v. Ball*, 696 F.2d 17, 21 (2nd Cir. 1982) (officer who failed to prevent arrest, and who actively participated in the arrest presented jury question on officer's liability under §1983); *Webb v. Hiykel*, 713 F.2d 405, 408 (8th Cir. 1983) (directed verdict for non-participating officer reversed, where officer took no steps to prevent beating); *Putman v. Gerloff*, 639 F.2d 415, 423 (8th Cir. 1981) (directed verdict for non-participating officer reversed, where officer took no steps to prevent beating); *Smith v. Dooley*, 591 F. Supp. 1157, 1169 (W.D. La. 1984), *aff'd*, 778 F.2d 788 (5th Cir. 1985)

A police officer can be liable under 42 U.S.C. §1983, even if his sole role is a participant in a cover-up of another officer's use of excessive force. *Santiago v. Fenton*, 891 F.2d 373, 384 (1st Cir. 1989). In *Santiago*, the court held that the district court erred in directing a verdict in favor of police officers charged with conspiracy to violate the plaintiff's civil rights. The *Santiago* court held that if the jury believed that there was no probable cause for the officers to arrest the plaintiff, and that the officers fabricated their story, the jury could have believed that there was a conspiracy. 891 F.2d at 389.

The *Santiago* case demonstrates that a conspiracy to cover-up should not be resolved on a directed verdict. Similarly, the court in *Stone v. City of Chicago*, 738 F.2d 896 (7th Cir. 1984) reached the same result. *Stone* is particularly applicable to this case. There, the evidence showed that after the plaintiff was injured, the defendants huddled together, conversing among themselves and created official reports containing false information. The court held that this was sufficient to create a jury question as to the liability of

the officers who covered up the original excessive force. 738 F.2d at 900.

Similarly, in this case, the Plaintiff testified that immediately after he felt his leg being broken, he saw headlights arrive at the parking lot, and he heard Grant say "[w]hat the hell is going on." Grant then talked with Mattino and Himmelsbach. Grant then prepared property damage reports consistent with Himmelsbach's version of the events. If this testimony were true, then this would show that Grant conspired with Himmelsbach and Mattino to cover up their use of excessive force against the Plaintiff. Thus, in this case, it was error to direct a verdict in favor of Grant.

The *per curiam* decision in this case ignores this body of case law. The conflict between the eleventh circuit's decision and the decisions of these other circuits warrants review by this court.

CONCLUSION

It is a fundamental principal that trials should be conducted on the evidence, not on prejudice engendered by improper evidence. The decision in this case based upon that prejudicial evidence so far conflicts with decisions of this Court and other circuit courts that it should be reviewed.

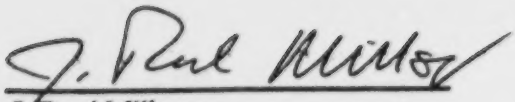
Similarly, the need for an ordered system of justice, based upon a uniform application of the Federal Rules of Civil Procedure, requires review by this court.

Finally, the directed verdict in this case was so contrary to the decisions of other circuits that it must be reviewed.

For all of these reasons, the Petitioner prays that this Court grant the Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals.

Respectfully submitted,

John W. Carroll



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APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-4764
Non-Argument Calendar

D. C. Docket NO. 93-8460-CIV-KLR

TERRY P. PLESCHER,

Plaintiff-Appellant

JILL PLESCHER, his wife,

Plaintiff,

versus

RICHARD P. WILLE, in his individual and official capacities as Sheriff of the Palm Beach County Sheriff's Office, RONALD T. MATTINO, JR., EDWARD F. HIMMELSBACH, GLEN M. GARFIELD, individually and in his official capacity as Deputy Sheriff of the Palm Beach County Sheriff's Office, DAVID M. GRANT, individually, and his official capacity as Deputy Sheriff of the Palm Beach County Sheriff's Office,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(June 10, 1996)

Before KRAVITCH, ANDERSON, and BIRCH, Circuit Judges.
PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.[1]

"Costs taxed against plaintiff-appellant."

Judgment Entered: June 10, 1996
For the court: Miguel J. Cortez, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 7/18/96

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[1] 11th Cir. R. 36-1 provides:
When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;
(b) the evidence in support of a jury verdict is sufficient;
(c) the order of an administrative agency is supported by substantial evidence on the records as a whole;
(d) summary judgment, directed verdict, or judgment on the pleadings is support by the record;
(e) judgment has been entered without a reversible error of law; and an opinion would have no precendential value, the judgment or order may be affirmed or enforced without opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 93-8460-CIV-RYSKAMP

TERRY PLESCHER,

Plaintiff,

vs.

RICHARD WILLE, in his individual and official capacities as Sheriff o the PALM BEACH COUNTY SHERIFF'S OFFICE, RONALD TO. MATTINO, JR., EDWARD F. HIMMELSBACH, GLEN M. GARFIELD and DAVID M. GRANT individually, and in their official capacities as Deputy Sheriff's of the PALM BEACH COUNTY SHERIFF'S OFFICE

Defendants. /

ORDER DENYING PLAINTIFF'S MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

THIS CAUSE came before the court upon the motion of the plaintiff for a judgment notwithstanding the verdict or, in the alternative, for a new trial. The defendant has filed a response in opposition.

THE COURT has considered the motion and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that the motion of the plaintiff for a

judgment notwithstanding the verdict or, in the alternative, for a new trial is hereby DENIED.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 21 day of April, 1995.

/s/_____
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

copies provided:

Scott S. Warburton
John W. Carroll

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 93-8460-CIV-RYSKAMP

TERRY PLESCHER,

Plaintiff,

vs.

RICHARD WILLE, in his individual and official capacities as Sheriff o the PALM BEACH COUNTY SHERIFF'S OFFICE, RONALD TO. MATTINO, JR., EDWARD F. HIMMELSBACH, GLEN M. GARFIELD and DAVID M. GRANT individually, and in their official capacities as Deputy Sheriff's of the PALM BEACH COUNTY SHERIFF'S OFFICE

Defendants. /

FINAL JUDGMENT
(COUNTS I-V ONLY)

THIS action came on for trial before the court and a jury, Honorable Kenneth L. Ryskamp, District Court Judge, presiding and the issues having been duly tried, and the jury having duly rendered a verdict in favor of the defendants Mattino and Himmelsbach.

Final Judgement [sic] is hereby entered for defendants Ronald T. Mattino, Jr., and Edward F. Himmelsbach, and against plaintiff as to counts I - V of the amended complaint.

The court having granted a motion for directed verdict for the

defendant David M. Grant, Final Judgment is hereby entered for the defendant as to counts I - V of the amended complaint.

For the reasons stated in open court, Final Judgment is hereby entered for the defendant Richard Wille, in his individual and official capacities as Sheriff of the Palm Beach County Sheriff's Office as to counts I-V of the amended complaint..

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 19 day of May, 1995.

/s/_____
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

copies provided:

Scott S. Warburton
John W. Carroll